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1 APPEARANCES CONTINUED

2
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PROCEEDINGS

MAY 31, 2011:

THE COURT: The court will be on the record in the matter of the United States v. Harold Wells, Nic DeBruin, Ernest Bruce Bonham, 10-CR-116. Counsel, please enter your appearances.

MS. DUKE: Jane Duke for the United States.

MS. HARRIS: Patricia Harris for the United States.

MR. HARRIS: Pat Harris for the United States.

MR. GOTCHER: Warren Gotcher appearing for Mr. Wells,
and Mr. Wells appears in person, Your Honor.

MS. MCMURRAY: Shannon McMurray for Mr. DeBruin.
Mr. DeBruin is here in court today.

MR. LUNN: William D. Lunn for Mr. Bonham, who's here.

THE COURT: The first matter we need to take up is we have a note from a juror. Is the juror present?

JUROR GRIFFIN: Yes.

THE COURT: Your are Janice Griffin?

JUROR GRIFFIN: Yes, sir.

THE COURT: The note says, "The children in the hallway are with me. I was appointed by Judge David Gamble of Osage County Court as visitation supervisor. They are not supposed to be out of my presence until June 27. They will have to be here as long as I am here." Signed by Janice

Terri Beeler, RMR, FCRR
United States Court Reporter
333 W. 4th St.
Tulsa, OK 74103 * 918-699-4877

1 Griffin.

2 Government wish to be heard?

3 MS. DUKE: No, Your Honor.

4 MR. GOTCHER: No, sir, Your Honor.

5 MS. MCMURRAY: No, Your Honor.

6 MR. LUNN: No, Your Honor.

7 THE COURT: All right. You'll be excused,
8 Ms. Griffin.

9 Do we have other matters to take up prior to bringing
10 in the panel for voir dire? And we'll talk a little bit about
11 how we're going to do that once we've taken up any other
12 matters we need to take up. Anything from the government?

13 MS. DUKE: Your Honor, there are a number of pending
14 motions. I don't know if the court's preference is to take
15 those up before voir dire or before the opening statements.

16 THE COURT: All right, let's begin. Does the
17 government have pending motions?

18 MS. DUKE: Your Honor, I don't believe there are any
19 pending motions by the government. I think the bulk of the
20 motions are filed by the defense. There are some 404(b)
21 notices pending that are subject to dispute.

22 THE COURT: Those will probably be taken up as we
23 proceed with the evidence, but let's proceed with the defense
24 motions first. Mr. Gotcher.

25 MR. GOTCHER: Your Honor, I think -- I briefed all

1 the motions. I could stand on those or I can go over them if
2 you want me to.

3 THE COURT: Let's just go over them. I'll give you a
4 ruling as we go.

5 MR. GOTCHER: I think the first one was on the
6 404(b), information that they had that I don't think was
7 entirely accurate on what they put out, according to the
8 discovery. And so I did not think that it arose to a crime at
9 that point, as I think I sat out in my motion. That had to do
10 with a alleged J.J. Gray taking some dope, giving it to another
11 person to sell. He indicated that Mr. Wells thought that the
12 dope was going to be taken to be put back into a sting
13 operation to get a Mexican dealer. The Mexican dealer at that
14 point, due to some changes in the laws, left the state -- left
15 the country, I think. And at that point, Mr. Gray then took
16 the dope to a informant of his and had it sold.

17 In all fairness, Your Honor, they did say that
18 Mr. Gray did tell Mr. Wells that, but there's no date and time
19 on that. And I believe any explanation occurred after the
20 government's investigation, Mr. Gray was cooperating. So I
21 would think, Your Honor, that that would not fall within 404(b)
22 since it was not a crime. It was set up for a sting
23 operation.

24 Then I think, Your Honor, there was a motion in
25 limine that we filed concerning the Jerry Clyde Stevenson

1 matter. I'm not sure you ruled on that. That had to do with
2 bias, we thought we should really get into it on bias of J.J.
3 Gray. Obviously it depends upon the testimony, but I think it
4 does rise to bias because --

5 THE COURT: Outline that for me a little bit
6 further. What are you talking about? Is this the robberies?

7 MR. GOTCHER: Yes, sir, this is the robbery stuff.

8 THE COURT: Do you have some conviction or some
9 evidence to prove that? We're not going to have a separate
10 trial to determine whether J.J. Gray was involved in that.

11 MR. GOTCHER: Your Honor, I think extrinsic evidence
12 can be used to show bias, and I think we do have some
13 witnesses --

14 THE COURT: Well, there isn't any question about
15 that, but you don't have any extrinsic evidence. I'll let you
16 ask one question. If he denies it, then that's going to be the
17 end of that under extrinsic evidence. You're also familiar
18 with that rule, I assume.

19 MR. GOTCHER: Impeachment on collateral issue, yes,
20 sir.

21 THE COURT: Yes, sir. It's not a collateral issue
22 unless you have some proof of conviction or something else
23 that's coming in under 608.

24 MR. GOTCHER: Okay.

25 THE COURT: I think I said that last time, but go

1 ahead.

2 MR. GOTCHER: I believe that was the only ones I had,
3 Your Honor, that were pending.

4 THE COURT: Ms. McMurray, do you have any motions you
5 wish to take up before we bring in the jury?

6 MS. MCMURRAY: Mine also deals with a 404(b) notice
7 that was proffered by the government relating to some alleged
8 statements by Mr. DeBruin to, I think, Cal Kaiser stating that
9 on -- we don't know when, where or how this conversation
10 allegedly occurred, but that Nic DeBruin had personal knowledge
11 of Wells taking money for his own personal benefit. And I've
12 outlined in the case law why I believe that's totally
13 inappropriate under 404(b), and ask that they not be allowed to
14 bring that in.

15 THE COURT: Can you find out when, where and what was
16 said on cross-examination?

17 MS. MCMURRAY: Probably not. I mean, if he didn't
18 know it then, I don't know why he'd know it now. That's the
19 point. It's out there, and it's like unringing a bell.
20 It's --

21 THE COURT: Are you saying he has no knowledge of any
22 of these factors? He doesn't know when it happened or who was
23 there or what was said or -- doesn't sound like it's going to
24 come in in that case. There's really nothing to testify about.

25 MS. MCMURRAY: Well, that's my point, Judge. He

1 doesn't -- in his interviews with the government, he just says,
2 Nic DeBruin told me of personal knowledge of Wells stealing
3 money. And he gives no facts, no specifics how it occurred,
4 when it occurred, when specifically Nic knew this. And beyond
5 that --

6 THE COURT: So you're not saying you can't cover it
7 on cross-examination; you're just saying that at this point,
8 you don't know what the answer is? He doesn't make any
9 representations he has no knowledge of any of these things?

10 MS. MCMURRAY: Other than just the conclusion that
11 this occurred. And further, Judge, I don't think it rises to
12 the level of 404(b) information. It's not evidence of a crime,
13 and it's improper.

14 THE COURT: It certainly would seem to go to
15 conspiracy in this matter.

16 MS. MCMURRAY: I'll stand on the motion in that it's
17 improper.

18 THE COURT: I'm inclined to admit it at this point.
19 We'll see how the evidence develops, but I have to say at this
20 point, based on what I've heard, it seems likely it will come
21 in.

22 MS. MCMURRAY: Judge, additionally, I just filed a
23 response to the government's request for in limine regarding
24 J.J. Gray's involvement with the Jerry Clyde Stevenson burglary
25 ring. I think there's ample evidence that the court and the

1 jury should hear about his involvement and the scope and depth
2 of his criminal activities that --

3 THE COURT: What do you have that you are going to
4 prove that with?

5 MS. MCMURRAY: Well, I have --

6 THE COURT: Articles from the Tulsa World?

7 MS. MCMURRAY: Pardon me?

8 THE COURT: What do you have that you're going to
9 prove that with?

10 MS. MCMURRAY: Well, I have -- more importantly, I
11 have that the government declined to investigate or allow
12 investigation, and I think that's important for the jury to
13 know.

14 THE COURT: How are you going to prove that?

15 MS. MCMURRAY: I have officers that will come in and
16 testify that they took this information to the government and
17 it was made very clear --

18 THE COURT: You don't know whether they've
19 investigated it or not, do you?

20 MS. MCMURRAY: Who?

21 THE COURT: The government.

22 MS. MCMURRAY: They said they haven't in their
23 motion. They said that the responsibility to investigate J.J.
24 Gray lies at the feet of the U.S. Attorneys's Office for the
25 Northern District of Oklahoma or the Tulsa County District

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1 Attorney's Office.

2 THE COURT: Well, you really wouldn't expect the
3 Eastern District of Arkansas to be investigating that, would
4 you?

5 MS. MCMURRAY: Well, they're investigating the public
6 corruption case, Your Honor, so, yes, I would.

7 THE COURT: Well, in any event, that's clearly a
8 collateral matter, and you have no proof it's going to persuade
9 the jury. Clearly if you have a conviction or admission, then
10 I'd be willing to consider it. Otherwise, I don't see it
11 coming in.

12 MS. MCMURRAY: Well, Judge, just for the record, I
13 think there's case law that states that failure of a defense
14 counsel to look into and reach out and advise the jury or
15 expose to the jury tacit plea agreements is error. And --

16 THE COURT: What do you have to show there's a tacit
17 plea agreement?

18 MS. MCMURRAY: Well, Judge, I think that there's
19 going to be ample evidence of continuing looking the other way
20 by the government on crimes that J.J. Gray has committed. Now,
21 that's done either in a tacit plea agreement or they don't want
22 to know or they want to preserve the integrity and what
23 credibility J.J. Gray has. If he comes in here and says, I did
24 this little bit, but I didn't do this, and the jury thinks
25 that, well, he must be telling the truth, when we can't go into

1 these things that he didn't disclose in his 302s but we can
2 prove through other evidence, I think it's very important that
3 the jury know these things. And I think the case law supports
4 that the jury is entitled to know of these other crimes that
5 the government isn't looking into, that isn't reporting, and it
6 would -- it would affect my believability of J.J. Gray if I
7 were sitting on the jury.

8 THE COURT: If you had evidence of it that was
9 conclusive, I agree, it would, but I'm not going to try that
10 case within this case. We have plenty to say grace over here.
11 We're not going to be trying two cases within this trial.

12 MS. MCMURRAY: I'm not asking to try two cases.

13 THE COURT: It sounds like you are. You're trying to
14 prove J.J. Gray was involved in all these other things, and we
15 have no conclusive proof of that, so then the government has to
16 rebut it and then we're trying a second case. I'm not going to
17 do that.

18 MS. MCMURRAY: I think the more important part of it
19 is the fact that the government said, I don't want to hear
20 about that case. We don't want to --

21 THE COURT: If you've got some evidence that says
22 that it's clear that the government says, we don't want to know
23 anything about this, we're going to look the other way, then
24 you can bring that up.

25 MS. MCMURRAY: That's what I'm asking to do, Judge.

1 THE COURT: We'll see who that is and how it comes
2 up.

3 MS. MCMURRAY: Thank you. And then I had just joined
4 in a couple of motions with Mr. Lunn regarding the audio and
5 video, but I'll let him --

6 THE COURT: I think I've already ruled on that, but
7 I'll hear from Mr. Lunn again.

8 Mr. Gotcher.

9 MR. GOTCHER: Can I take the podium for one second?

10 THE COURT: Yes.

11 MR. GOTCHER: She did remind me I did have one other
12 motion in there, Your Honor, it had to do with the same
13 statement of Nic DeBruin saying that Mr. Wells had taken
14 money. Obviously it's not coconspirator hearsay because it was
15 not during any course of any conspiracy, they haven't alleged
16 that. It's hearsay as to H.R. Wells. If it comes in, we would
17 ask for a severance.

18 Even the government recognizes that there's a
19 problem, because in a footnote to their 404(b), they
20 acknowledge that they would Brutonize it and take out any name
21 of H.R. Wells. We would object to it and move for a limine in
22 that.

23 THE COURT: I don't understand Bruton in that
24 context, but I'll likely admit it. Mr. Lunn.

25 MR. LUNN: Judge, the government in this case has

1 filed three 404(b) notices. The first ones involve --
2 actually, the first two involve instances where the Roberts
3 case very likely comes into play, and I've cited that case for
4 the court. It's basically where the government just simply has
5 indicated that something has happened. In the first instance,
6 it has to do with some type of stealing going on during the
7 course of the search warrant execution. But it fails to give
8 any information about what parties are involved in the search
9 warrant execution, any specific address, any specific date,
10 anything.

11 So as a result, I find myself in a situation of
12 looking through 65,000 pages of discovery trying to guess which
13 search warrant execution we might be dealing with. And for
14 that matter, it might not even be a search warrant execution;
15 it could be a knock and talk. It could be anything.

16 THE COURT: Did you make any attempt to send an
17 interrogatory or to find this in any way?

18 MR. LUNN: I filed a motion, obviously, and there
19 hasn't been any real response to it. The government hasn't
20 done anything to elaborate as to where that might have been.

21 Now, I obviously -- I can make guesses, but I don't
22 want to get into trial and have made the wrong guess about
23 possibly which search warrant execution we're looking at.

24 The other cases -- the other situation, which is
25 their second 404(b) notice, is even more general than that;

1 it's just that they knew that supposedly Wells was stealing or
2 committing crimes during the course of -- and that they don't
3 give any specifics as to what crimes or where or anything of
4 that nature. It's very, very similar to the Roberts case,
5 which just basically involves the idea that there were some
6 type of -- that other women had been involved in -- as victims
7 in certain incidences. So --

8 THE COURT: How does that reflect on your client, if
9 it deals with Mr. Wells?

10 MR. LUNN: Well, the idea is that he is in a broad
11 conspiracy with Mr. Wells and he knows that he's committing
12 crimes, and so it's no surprise to him that there's crimes
13 going on at any point when he's associated with him. So that
14 would be the problem.

15 So based on -- we feel that based on the Roberts
16 case, that the government has provided insufficient information
17 for us to be able to respond appropriately for purposes of
18 trial.

19 The third 404(b) notice does involve actually
20 specific dates and times; however, there is some hearsay that's
21 involved with it where there's an effort made to claim that
22 Officer McFadden has said that he's aware of certain times when
23 Officer Henderson has provided money to Officer Bonham.

24 We think that's inappropriate. Obviously if they
25 want to call Officer Henderson, I guess they could. I think

1 that's highly unlikely, however.

2 THE COURT: There may be some Constitutional issues
3 there.

4 MR. LUNN: I think the most that we can just simply
5 say is to go back to a 403 analysis where we're getting into a
6 situation where obviously the court needs to consider
7 everything that's going on in the trial. And you may very well
8 have a situation with Officer Bonham where the admission of
9 this type of evidence really outweighs, is more prejudicial to
10 Officer Bonham than anything else.

11 THE COURT: Well, I can't make that decision at this
12 point. I'll have to see how the evidence develops.

13 MR. LUNN: Judge, there is two other matters. One of
14 them is our motion to reconsider. The first motion in limine
15 has to do with the concept of the Rule of Completeness. As you
16 know, Judge, when we were last here, May the 2nd, we wanted to
17 have an opportunity to inspect the equipment and recordings so
18 that we could get proper forensic recordings done.

19 We were ultimately able to determine that there are
20 gaps in these tapes at critical points in time. The gaps can
21 be based on one of two things, either the government has
22 deliberately redacted certain portions of that -- of those
23 tapes at given times, which seems to be very possible -- very
24 possibly what's happened --

25 THE COURT: Does your expert have any evidence to

1 support that?

2 MR. LUNN: To some extent, yes. And that's part of
3 the reason what we gained from the inspection, and I provided
4 that in the motion to compel. The key fob was operating
5 without any problems. It had plenty of battery storage, there
6 wasn't any reason for it to have been suddenly discontinued.
7 And it indicates that it's --

8 THE COURT: The government says they're not going to
9 use the key fob, and it doesn't seem to implicate your client
10 in any fashion that I can see.

11 MR. LUNN: Well, our position is that the key fob as
12 well as the audiotape -- the key fob involves things that go on
13 in the motel room. All of the audio recordings are linked
14 together. The court should not take a position that it's okay
15 for the government to play just the videotape and just ignore
16 the audiotapes or to play just a portion of the audiotape in
17 the motel room, then not play other portions of the audiotapes
18 in the motel room, or to ignore a key fob which involves some
19 recordings that take place in the motel room and other
20 recordings that take place in the area where things are going
21 on.

22 And for -- and that all falls back into this concept
23 to the Rule of Completeness under 106 that in -- with the
24 concept of fairness, and I cited several cases to you, that the
25 court does have the ability to throw them all out if the

1 government can't provide a complete tape.

2 And in this case, that's exactly what's going on
3 here. We have two really critical points in this case that we
4 believe would exonerate Bruce Bonham. Certainly Bruce Bonham
5 asked to get the audios from the very moment that he knew there
6 was both audio and video recordings. And it's the government
7 that, either through inadequate equipment, they're using Super
8 8 recording tapes and other antiquated equipment in the motel
9 room, they're using a slightly more advanced digital audio
10 system with the key fob. There's an increased likelihood,
11 according to our expert, that the omissions were done by the
12 government and not by any other explanation.

13 That falls back again to a motion to compel which we
14 filed where we requested that the government provide us with
15 the FBI notes from the motel room. I've never been in an audio
16 surveillance or a video surveillance situation where there were
17 not fairly specific instructions for FBI officers in the
18 process of conducting --

19 THE COURT: You filed that Friday, as I recall.

20 MR. LUNN: Yes, but that was because I only got the
21 information from them just earlier in the week where we have
22 been able to get an inspection of the tapes. And so we've been
23 asking for two and a half months to be able to get our
24 inspection, and at that point, we realized there was a genuine
25 issue as to --

1 THE COURT: And your theory is that the instructions
2 say wherever there is exculpatory evidence deleted?

3 MR. LUNN: I think what's going on here is that the
4 FBI agents have instructions that say whenever the consenting
5 party is outside of the presence of these officers, that you're
6 not supposed to be recording.

7 And so what you have with the key fob is you have Nic
8 DeBruin leaving the presence of one federal agent and suddenly
9 the recording stops, and then it recommences when he enters the
10 presence, going back into the motel room, of the second federal
11 agent.

12 THE COURT: Okay, let's assume that's true. What
13 would that prove?

14 MR. LUNN: In our case, there's critical evidence
15 about Mr. DeBruin contacting the canine officer in this case,
16 talking with Officer Bonham, so there are matters that take
17 place during this gap that are critical to us for purposes of
18 being able to establish that Officer Bonham isn't doing
19 anything illegal.

20 THE COURT: I understand that, if that's so, but if
21 the instructions are don't tape when the CI is not in the room,
22 how would that address incompleteness? What would that show?
23 Some sinister motive? That would show they agree with you
24 perhaps on the law, but not with the court.

25 MR. LUNN: Well, you have a heightened situation of

1 unfairness that's taking place if the government is allowed to
2 play portions of either these video or audiotapes --

3 THE COURT: Which is what I understand from your
4 brief you intend to do.

5 MR. LUNN: -- when the consenting -- only if the
6 government is allowed to play portions of these audiotapes,
7 that's right.

8 THE COURT: Then you're going to play other portions,
9 or you're going to play it all.

10 MR. LUNN: I'll do that. But our position is that
11 obviously they shouldn't be allowed to play any of it.

12 THE COURT: I understand.

13 MR. LUNN: So -- but if the government is allowed to
14 have the opportunity to play portions of these videotapes that
15 they think helps them prove their case, and they're able to
16 redact those portions or make impossible the recording of other
17 portions of the videotape that are exculpatory to my client,
18 then that's unfair. And because of that unfairness, the court
19 should throw out all the tapes.

20 THE COURT: I'm not going to do that, so I've ruled
21 on that. I'll decline your motion to reconsider.

22 MR. LUNN: What about the motion to compel? Are we
23 able to get the FBI notes?

24 THE COURT: I want to hear from the government, what
25 they have to say about that.

1 MR. LUNN: Thank you.

2 THE COURT: Ms. Duke.

3 MS. DUKE: Thank you, Your Honor. With respect to
4 these distinct and separate pieces of evidence, the key fob
5 device that Mr. Lunn keeps referring to is a self-contained
6 recorder. It is a concealed device that records itself. It is
7 within the control of the person who has possession of it.
8 Access on and off is controlled by pushing the buttons. So
9 when there are gaps in that tape, it's because these defendants
10 and other officers are roaming around the parking lot clicking
11 the button.

12 With respect to that device, since it is a
13 self-contained recording device, there were no minimization
14 instructions regarding the key fob. It recorded if it was
15 activated.

16 THE COURT: Let's hear about the other materials.
17 Let me hear about the -- what I'm more interested in, frankly,
18 is the search warrant execution and the other crimes relating
19 to Mr. Wells.

20 MS. DUKE: Mr. Harris is going to handle those,
21 Your Honor.

22 THE COURT: All right.

23 MS. HARRIS: As to the 404(b) stuff, Mr. Lunn says he
24 doesn't know what this is. Every one of our responses -- I'm
25 talking about document 176, document 167, and document 166 --

1 are our responses. Every one of them point out to him the
2 Bates numbers of where this material is. He says he doesn't
3 know where this information is, he doesn't know anything
4 specific.

5 THE COURT: Does that have some indication of when
6 this search occurred or what the parameters were?

7 MS. HARRIS: It has as much as we know, yes, sir. I
8 mean, we've given him everything we know. Callison Kaiser is
9 going to testify that he was assisting on a TPD search in the
10 north side of Tulsa near Pine and Lewis, and he's going to talk
11 about that. He's going to talk about that during the search,
12 an officer gave him some money, he thinks it was Jeff
13 Henderson, and he shared it and he did so, including sharing
14 some of the money with Bonham, Mr. Bonham.

15 McFadden is going to testify on June 12 -- going to
16 testify that on June 12, 2007, he, Henderson, Bonham and other
17 witnesses -- other officers were at the search of Isaias
18 Gonzalez's house at 4112 South 130th East Avenue, Apartment 510
19 in Tulsa, and he's going to testify about what happened there,
20 that Henderson took two to three pounds of meth and that
21 Mr. Bonham -- one of the officers said, You're taking too much,
22 and Mr. Bonham said, Who cares? It's just some Mexican. He
23 was present.

24 Then the third one is also another one of Callison
25 Kaiser. And he's going to testify that he's aware that

1 Mr. Bonham stated that -- Mr. Bonham states that Harold Wells
2 was taking money for his own benefit. And Mr. Kaiser can
3 testify to that. That's going to be the testimony. They can
4 cross-examine him. And Mr. Kaiser will --

5 THE COURT: All right. Sounds fairly specific,
6 Mr. Lunn.

7 MR. LUNN: Judge, I think a very critical
8 consideration with regard to the key fob, and for that matter
9 the audio equipment in the room, is that we expressly requested
10 the government to provide us that equipment so that we could
11 determine whether or not the key fob really turned on and off
12 and whether the -- that the audio equipment suddenly stopped
13 recording whenever --

14 THE COURT: Well, it didn't suddenly stop. Their
15 explanation is you knock the lamp shade or the alarm clock and
16 thereby knock the recording device.

17 MR. LUNN: Well, that's fine. That's their
18 explanation. But we certainly had our forensic expert there
19 ready to determine whether their explanation made any sense,
20 and they refused to provide us any of that equipment.

21 THE COURT: All right.

22 MR. LUNN: So we can't confront them about their
23 explanation, and that's a problem.

24 THE COURT: Now, your expert can testify to that?

25 MR. LUNN: Yes. He can certainly indicate that we

1 requested the equipment. He can certainly testify that they
2 refused to provide it to him.

3 THE COURT: All right.

4 Ms. Duke, are you refusing to provide it? Because I
5 will let him testify to that.

6 MS. DUKE: Your Honor, first, with respect to
7 Mr. Lunn's request, at no point has access to the equipment
8 been brought before this court by a motion filed by Mr. Lunn.
9 He has certainly requested it, but it is proprietary law
10 enforcement-sensitive devices that the Bureau does not disclose
11 the inner mechanisms of, for very obvious reasons.

12 Mr. Lunn attended the inspection of the original
13 recordings which this court directed. His expert was there.
14 Ms. Trisha Harris for the government was there. During the
15 course of that inspection, the expert stated to Ms. Harris that
16 he understood what happened with respect to those wireless
17 devices in the room after looking at this.

18 And point of fact, Your Honor, Mr. Lunn, who made
19 such an issue about the United States not producing a byte --
20 forensic byte stream image of the audio and video from the
21 motel room, when his expert got to the inspection, the expert
22 said, I don't need to duplicate those, I have what I already
23 need.

24 So they've had all this information to come up with
25 their analysis. The analysis shows exactly what we've been

1 representing to the court and to the parties, that the devices,
2 because they were wireless, disconnected during the search
3 activities. They are complete in that we will play them all
4 until they terminate.

5 And so, no, the devices themselves were not allowed
6 access. Mr. Lunn was at that inspection. He was not present
7 in the room. The expert explained that he expected that that
8 would be the position of the United States, and nothing more
9 was made of it, Your Honor.

10 THE COURT: Fair enough. I think we're done with
11 that issue, Mr. Lunn. We're going to allow it. You can put
12 your expert on to say whatever he found or thought.

13 MR. LUNN: Judge -- I understand the court's ruling.
14 I'm a little concerned about the statements made by Ms. Duke.
15 I was present --

16 THE COURT: If your expert testifies as you've
17 represented, they're entitled to rebut that testimony with
18 anyone who was there who says your expert said, This is fine
19 with me.

20 MR. LUNN: Okay. And mind you, we did do additional
21 recording while we were there. I was present at the time when
22 the government announced -- at the very, very first, within the
23 first five minutes, that they were not going to provide the
24 recording equipment. And we had to simply accept that, even
25 though we specifically requested it.

1 THE COURT: Well, they are not going to. And you can
2 point that out to the jury.

3 MR. LUNN: With regard to the Callison Kaiser
4 incident at Pine and Admiral sometime in 2007 --

5 THE COURT: Pine and Lewis, I believe.

6 MR. LUNN: That's the extent of what we know. There
7 are probably --

8 THE COURT: Does your client go to Pine and Lewis
9 every week or is that a frequent occurrence?

10 MR. LUNN: He's on the north side. That address --

11 THE COURT: And he was involved with Kaiser in more
12 than one search of that property?

13 MR. LUNN: Absolutely. There are dozens of searches
14 that have taken place.

15 THE COURT: At that property?

16 MR. LUNN: Well, we're not talking about a property
17 that's at Pine and Sheridan. We're talking about a property
18 that's somewhere around there --

19 THE COURT: A property at Pine and Lewis.

20 MR. LUNN: We're talking about a property that's
21 somewhere around there, and the property has never been
22 identified. The date has never been identified any more than
23 just simply 2007. Jeff Henderson during 2007 probably was at
24 dozens of search warrant executions. So it's impossible based
25 on the information that the government has provided us for us

1 to determine what incident we're talking about.

2 THE COURT: I'll let you cover that on
3 cross-examination. Anything else?

4 MR. LUNN: No.

5 THE COURT: All right. Anything else of legal
6 substance before we begin talking about voir dire? Ms. Harris.

7 MS. HARRIS: Yes, sir, Your Honor. Just a couple of
8 things. Mr. Gotcher brought up some 404(b) information about
9 Mr. Wells, and I can respond to that.

10 Essentially the evidence on Mr. Wells 404(b) is that
11 Mr. -- that ATF agent McFadden and Mr. Wells conducted a
12 traffic stop, it was in 2007. They seized seven pounds of
13 marijuana. The testimony will be that Mr. Wells maintained
14 custody of that marijuana at his residence for several days.
15 He then turned it over to Mr. Gray, gave it to Deb Clayton to
16 sell, Deb Clayton sold it and later gave Gray some of the
17 proceedings.

18 According to Mr. Gray, who offered the testimony,
19 Mr. Wells was aware that the marijuana was distributed by
20 Ms. Clayton.

21 So we -- it's our position that the information
22 contained in the 404(b) notice and in the discovery is adequate
23 to identify the information and is specific enough, and if
24 there is any concern about that, it can be dealt with on
25 cross-examination.

1 The final thing that I think the government wants to
2 bring up is a brief that we filed with regard to the admission
3 and/or use of transcripts of the audio recordings. And it's
4 the government's position and desire to play along with the
5 audio recordings a transcript or show a transcript of those
6 recordings. And that brief is filed in document 186,
7 Your Honor. It sets forth Tenth Circuit law, all of which
8 upholds the use of transcripts.

9 Certainly the best-case scenario would be if the
10 defense and the prosecution agree on the substance of the
11 tapes. That has not come to pass. We have provided to the
12 defendants copies of the transcripts that we have prepared
13 based on review of the tapes by individuals who were listening
14 and/or participating in the conversations that are on those
15 tapes.

16 The Tenth Circuit has provided some options in the
17 event that the parties don't agree on what the tapes actually
18 say. One of those options is to have the court review it and
19 make a determination about its accuracy. Another is to have
20 the defense --

21 THE COURT: I've not seen any objections as of this
22 point. Is it your understanding there will be some?

23 MS. HARRIS: It is my understanding based on
24 communications with defense counsel -- we have provided them --
25 they have not provided alternative transcripts that they think

1 are accurate. So it's our --

2 THE COURT: Do they have an alternative version?

3 MS. HARRIS: If they do, they haven't provided those
4 to us. So just wanted to bring --

5 THE COURT: Have they given you specifics as to what
6 they think is inaccurate?

7 MS. HARRIS: No, Your Honor.

8 THE COURT: Who has got a problem with the
9 transcripts? Ms. McMurray?

10 MS. MCMURRAY: Judge, I'd have to talk with the
11 government. There's a few additions that I would want to make,
12 but by and large, I don't dispute, and would agree that that's
13 what the video says, but I'd like to have the entire video
14 transcribed. They kind of stop it. There's additional
15 conversations before the audio shuts off that I think should be
16 included. And then there are a couple of additions --

17 THE COURT: Why don't you take that up with the
18 government and see if you can resolve that. If not, I'll make
19 a ruling.

20 MS. MCMURRAY: Then they've got little balloons
21 outside where they tell the jury what's going on, and I do
22 object to those. I think they can look at the video and don't
23 need the little pocket bubbles about what they believe is going
24 on.

25 THE COURT: I assume those will not be included.

1 MS. HARRIS: Your Honor, that was just part of a
2 brief that we filed. The transcripts don't have any editorial
3 comments.

4 THE COURT: All right. All right. Anything else
5 before we start talking about voir dire?

6 In the future, when I say 9:00, I mean 9:00 for the
7 jury. The lawyers will be here at 8:30 to take up any
8 preliminary matters.

9 MS. DUKE: Yes, sir. Your Honor, pursuant to the
10 court's trial notice, specifically on page 6, it directed that
11 10 working days before trial that the parties give notice of
12 any prior conviction evidence that would fall under the time
13 limits set forth in 609(b). Some of the witnesses' convictions
14 for the government are outside that time limit. We've received
15 no notice, so we would just request that defense counsel not
16 allude to those convictions outside of the 10-year limit for
17 witnesses Ryan Logsdon and Debra Clayton.

18 THE COURT: All right. Fair enough. You tendered no
19 voir dire, Mr. Lunn. You're not going to do voir dire. Is
20 that my understanding?

21 MR. LUNN: Judge, I haven't tendered any voir dire.

22 THE COURT: I guess you're not going to do anything?

23 MR. LUNN: I'm --

24 THE COURT: Did you read the instructions?

25 MR. LUNN: Well, I have. I just understood basically

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1 we've obviously had this written voir dire which pretty well
2 covered most everything that I would ordinary ask. Usually
3 something comes up in the way of questions -- additional
4 information that comes up during the course of people answering
5 questions or what have you, and so whatever voir dire I would
6 have would most likely be more related to that. So --

7 THE COURT: Clear it with the government first. If
8 they don't object, I don't have a problem with it. If they do
9 then, you're out of luck.

10 Ms. McMurray, you tendered voir dire this morning.
11 Has the government had a chance to see that?

12 MS. MCMURRAY: I think I did it Saturday or Sunday,
13 Judge.

14 THE COURT: Well --

15 MS. HARRIS: The government received Ms. McMurray's
16 voir dire.

17 THE COURT: Do you have any objection?

18 MS. HARRIS: No, Your Honor.

19 MR. LUNN: Judge, I will say that I did respond to
20 the government with relation to what I anticipated that voir
21 dire would be, and that is exactly what I just represented to
22 the court. So it would not come as any surprise.

23 THE COURT: Do you have objections to the
24 government's voir dire?

25 MR. LUNN: Judge, I object to the extent that it

1 becomes more fact specific. As long as we're asking more
2 generalized questions, I don't have a problem with the voir
3 dire.

4 THE COURT: That's why I have you exchange voir dire
5 questions so that you can make objections and we know where
6 we're going and what the problems are going to be.

7 MR. LUNN: Yes, and I informed the government in my
8 response relating to voir dire that I would object to questions
9 that are more -- which attempt to involve facts that relate to
10 the crime instead of -- the alleged crime itself. I do have
11 problems with that type of voir dire. If someone wants to ask
12 about what someone does for a job or how long they've lived in
13 Tulsa County, I certainly don't have any problems with that.

14 THE COURT: That should all be in the questionnaires,
15 I would hope. Ms. McMurray.

16 MS. MCMURRAY: Judge, I would just ask for just a few
17 minutes. We got a few last-minute --

18 THE COURT: Well, they were available last week. You
19 just got them at the last minute, I guess. Picked them up.

20 MS. MCMURRAY: The last e-mail I saw was they would
21 be delivered to us this morning. If there was another e-mail,
22 I did miss that.

23 THE COURT: All right.

24 MS. MCMURRAY: Thank you.

25 THE COURT: This is how this is going to work. We're

1 going to bring in one half of the jurors, seat them in the
2 back. I'll give them some preliminary statements about a
3 trial. I'll summarize the indictment, find out if people have
4 been exposed to the facts and, if so, what their exposure is
5 and if it's a problem. I'll give each of you 15 minutes to
6 voir dire the jury panel based on the questions you have
7 submitted.

8 We'll then excuse the jurors and take up for-cause
9 challenges and peremptory challenges. I will give the
10 government the standard ten plus one, and I'll give the
11 defendants the standard 16, and they'll each have an additional
12 one. So that will be 19. Any questions or issues?

13 MS. HARRIS: Your Honor, I have a question.

14 THE COURT: Yes, ma'am.

15 MS. HARRIS: We intend to, with the court's
16 permission, read our exhibit -- not our exhibit list, but our
17 witness list, so we can determine if any of the jurors might
18 know the witnesses. The defendants have produced extensive
19 witness lists, and we would ask that those names be identified
20 as well to the jurors for the same reason.

21 THE COURT: I normally have you each stand up and
22 introduce anyone who is assisting you at trial in this case.
23 I'll call on Ms. Duke, and she can introduce everyone who is
24 assisting her and then have them name their witnesses and
25 parties, to the extent that's applicable.

1 Any other questions or issues we need to take up?

2 MR. GOTCHER: Your Honor.

3 THE COURT: Yes, sir.

4 MR. GOTCHER: May I approach the reporter and
5 retrieve my witness list that's? That's the only one I think I
6 may have. I gave her a copy pursuant to --

7 THE COURT: Fair enough.

8 I'm surmising several of these are character
9 witnesses. I'm going to limit you to one character witness
10 apiece, and you can have others who testify if they have the
11 basis to give that opinion also testify, but this is not a
12 trial by character. It's a trial about the acts committed that
13 are charged in the indictment. So you may wish to make
14 revisions on that or not. But that's where we're going with
15 that. Ms. McMurray.

16 MS. MCMURRAY: Yes, sir, Judge, I identified a few
17 potential jurors that I think if we could all agree, should
18 just be excused for cause. Do you want to take that up at the
19 time, now or --

20 THE COURT: Let's take it up when we're doing
21 for-cause challenges. They may not be in the first group.

22 MS. MCMURRAY: Judge, can you hear me from here?

23 THE COURT: I can hear you.

24 MS. MCMURRAY: Additionally, for clarification, on
25 our witness list, they're not character witnesses, but we've

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1 identified five to six officers throughout the years to come in
2 and testify regarding drug distribution. You wouldn't consider
3 those character witnesses, would you?

4 THE COURT: Regarding the what?

5 MS. MCMURRAY: The drug distribution counts where
6 Eric Hill and Cal Kaiser state that they planted drugs and it
7 was common knowledge among TPD. So I've identified --

8 THE COURT: They're going to come in and say it
9 wasn't part of their common knowledge?

10 MS. MCMURRAY: Correct.

11 THE COURT: I don't see how that's going to be
12 relevant. You'd have to bring in everyone on the force.

13 MS. MCMURRAY: That's why I've just identified a
14 few. I could bring in everyone on the force, but I did
15 identify --

16 THE COURT: How are the few going to prove common
17 knowledge?

18 MS. MCMURRAY: They're going to disprove it. They're
19 putting us in a position of proving a negative, so I'm going to
20 bring witnesses in to say they've never seen it, heard of it,
21 they worked side by side.

22 THE COURT: That's a pretty collateral point. I'm
23 not going to allow substantial testimony on that. You can have
24 a few witnesses testify about that. I would suspect several of
25 those who are going to be on the stand were officers at various

1 times. You can ask them if they had heard about it.

2 MS. MCMURRAY: That's exactly what --

3 THE COURT: If you're calling them just for that
4 purpose, I think it's unlikely they are going to testify.

5 MS. MCMURRAY: If I'm calling them just for the
6 purpose of --

7 THE COURT: Of saying they didn't know about any drug
8 distribution.

9 MS. MCMURRAY: Well, there's more than that, but I
10 mean, that is --

11 THE COURT: If there's more than that, then perhaps
12 you can ask them that question when they're on the stand, but I
13 don't know how many officers there are on the police force, but
14 I assume more than a hundred. Probably a couple hundred, if
15 you cover all the years. We're not going to have 200 people
16 come in and testify they didn't know about it.

17 MS. MCMURRAY: I'm not asking for that, Judge.

18 THE COURT: All right. Anything else?

19 MR. LUNN: Judge, in that vein, we have an allegation
20 obviously that where we've asked for specific instances where
21 there might have been this type of drug substitution going on.
22 That hasn't been provided to us. And so we are dealing with a
23 situation that covers four years.

24 THE COURT: I think they just identified your client
25 was involved in some of those, and you were objecting to that.

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1 MR. LUNN: On drug distribution?

2 THE COURT: Distribution and sale of proceeds being
3 distributed back.

4 MR. LUNN: Judge, I don't -- well, our position would
5 be that if we're talking about those instances, for one thing,
6 there are a couple of 404(b) instances, those are not tied to
7 this specific allegation. So those were supposedly other
8 crimes. So they're not a part of the allegation. So really
9 all we're left with is a time period that spans four years and
10 that is vague, that does not include any specific instance.

11 And so to the extent that there -- that their
12 allegation is so open-ended, we think it is important to be
13 able to call a number of officers to be able to refute that
14 anything of that nature was going on during specific times of
15 that four-year period that our defendants are on the streets
16 and doing things --

17 THE COURT: Is this included in the indictment? Is
18 this some part of the charged offenses? What are you talking
19 about there are allegations that everyone knew? Where is that
20 in the indictment?

21 MR. LUNN: It's actually in some of the materials
22 that have been provided to us, either grand jury materials or
23 302 statements by the respective officers that are making that
24 allegation.

25 THE COURT: I don't see the relevance of that, so I'm

1 inclined to limit the government's evidence on that, and yours
2 as well. Whether everyone knew has nothing to do with the
3 specifics alleged in the indictment.

4 MR. LUNN: Judge, our point is that the only
5 specifics there are in the indictment is that something
6 supposedly went on over a course of four years, and we're
7 having to try to rebut that, and the only way we can do that
8 effectively is --

9 THE COURT: Well, show me in the indictment where it
10 says that.

11 MR. LUNN: The Counts 4 and 6. Dealing with Count 4,
12 a period of time that runs from January 2006 to December 2009,
13 and it identifies no specific incident --

14 THE COURT: And they're going to come in and testify
15 that Mr. Wells, Mr. DeBruin and Mr. Bonham did not use their
16 positions as Tulsa police officers to plant quantities of
17 marijuana, methamphetamine and cocaine and crack? Is that
18 going to be their testimony?

19 MR. LUNN: During -- we've got a period --

20 THE COURT: Or that they never heard about it?

21 MR. LUNN: Yes, we've got a period of four years
22 where there are numerous officers who are around Officer
23 Bonham, Officer DeBruin and Officer Wells on a regular basis
24 and, yes, they've never heard about it.

25 THE COURT: It doesn't prove they didn't do it.

1 MR. LUNN: Well, then what are we rebutting?

2 We're --

3 THE COURT: I guess you're rebutting -- the
4 government has to prove they did it. To the extent they don't
5 prove it, then you have nothing to rebut and your clients are
6 not going to be found guilty on Counts 4 and 6. If they prove
7 specifics, then you need to rebut the specifics. But just to
8 say I've never heard about it doesn't prove anything.

9 MR. LUNN: Well, thank you, Judge. I will -- I guess
10 we'll deal with it as we go along in the trial. Thank you.

11 THE COURT: Fair enough. Anything else? All right.
12 Let's take a recess and bring in the prospective jury.

13 (Whereupon a recess was had.)

14 (Voir dire was conducted and is filed in a separate
15 transcript.)

16 REPORTER'S CERTIFICATE

17 I CERTIFY THAT THE FOREGOING IS A TRUE AND CORRECT
18 TRANSCRIPT OF THE PROCEEDINGS IN THE ABOVE-ENTITLED
19 MATTER.

20

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